Canada. First Ministers' Conference on the Constitution.
Resources: the Saskatchewan Position.
Sept. 1980.

RESOURCES
THE SASKATCHEWAN POSITION

First Ministers' Conference on the Constitution

Ottawa

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RESOURCES

THE SASKATCHEWAN POSITION

The Government of Saskatchewan places great emphasis on the need for clarification and confirmation of the rights of provinces to manage and secure revenue from their natural resources.

This document seeks to explain the importance of resources to Saskatchewan, the uncertainty created by recent judgements of the Supreme Court of Canada, and the constitutional solution which is required.

I. THE IMPORTANCE OF RESOURCES TO THE SASKATCHEWAN ECONOMY

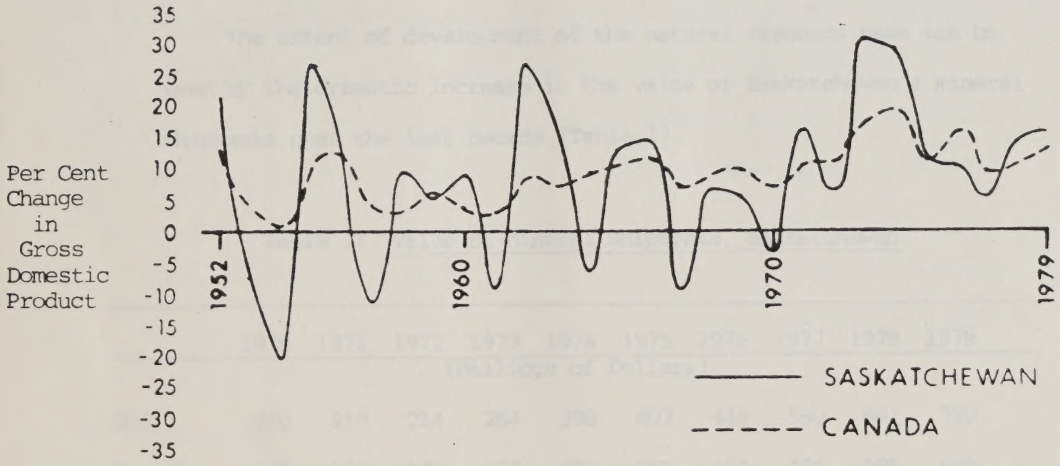
The Government of Saskatchewan's position on the constitutional issue of natural resources can best be understood and appreciated if one is aware of the importance of natural resources to the provincial economy. Besides adding economic stimulus and being a major source of provincial government revenues, the development of Saskatchewan's oil, potash, uranium and other natural resources is the key to stable economic growth.

Traditionally, the Saskatchewan economy has been based almost exclusively on agriculture and, in particular, one crop - wheat. This historical dependence on a single export industry - one which was characterized by highly volatile production and prices - meant that the province's economy was subject to the boom-and-bust cycle. This brought:

- large and frequently abrupt fluctuations in output, incomes and employment,
- periodic outflows of population, and
- variable provincial government revenues.

The overall growth rate performance of the Saskatchewan economy since the 1950's illustrates rather well the extreme cyclical behaviour stemming generally from the ups and downs of agriculture (Figure 1).

Figure 1: Growth Rates for the Saskatchewan and Canadian Economies



Source: Saskatchewan Bureau of Statistics, Provincial Economic Accounts and Statistics Canada, System of National Accounts.

While agriculture remains the foundation of the Saskatchewan economy, the emergence of mining as a major sector during the 1970's has meant that the province is now enjoying greater economic

stability than in the past. In 1979, the provincial economy was able to absorb a 23 percent decline in grain output and still maintain a strong 3.2 percent real growth rate. Moreover, despite grain production in 1980 being forecast to be only 70 percent of normal, some positive real economic growth is still anticipated for Saskatchewan as the resource and other sectors counterbalance the swings in agriculture. Had it not been for the development of the province's natural resources, the Saskatchewan economy would likely now be in a period of severe recession.

The extent of development of the natural resource base can be seen by the dramatic increase in the value of Saskatchewan's mineral shipments over the last decade (Table 1).

Table 1: Value of Mineral Shipments, Saskatchewan

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
	(Millions of Dollars)									
Oil	200	218	214	264	398	407	445	580	691	720
Potash	109	135	136	177	309	359	354	404	505	695
Uranium	11	8	9	10	14	16	45	75	261	258
Other	71	56	60	69	84	96	121	125	133	162
Total	390	417	419	520	805	877	964	1,184	1,590	1,835

Note: Components may not add to totals due to rounding.

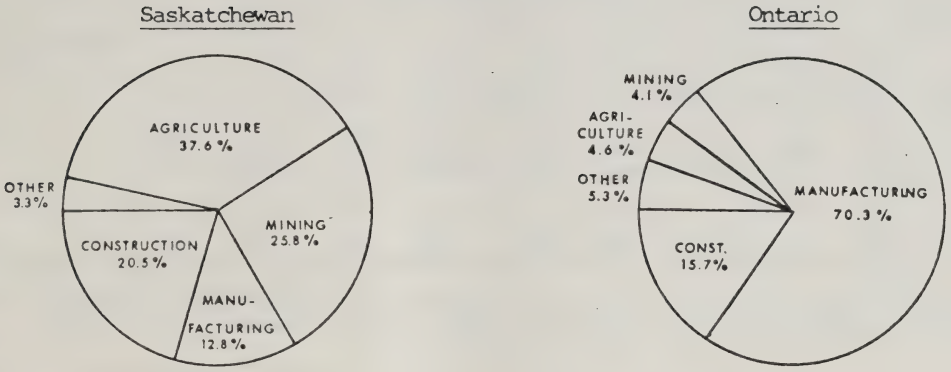
Source: Statistics Canada, General Review of Mining Industry, and Saskatchewan Mineral Resources.

Accompanying the dramatic growth of the mining sector has been the Saskatchewan government's natural resource policy. Through the design of resource payment structures with industry, direct Crown corporation participation and other measures, the government is attempting to maximize the economic benefits to the people of the province from the development of its depleting natural resources.

Furthermore, the Saskatchewan government is attempting to maximize the social benefits and to minimize adverse social and environmental impacts through careful management of resource development. For example, as a result of these policies, northern residents are able to participate in resource development projects in order to improve their labour skills and economic well-being. Resource development projects have also resulted in the establishment of a valuable infrastructure in northern Saskatchewan that will make a continuing contribution to its future social and economic development.

The importance of the resource sector to the Saskatchewan economy can be seen clearly by comparing the Saskatchewan and Ontario situations (Figure 2).

Figure 2: Distribution of Net Value of Production* for Saskatchewan and Ontario, 1977



* Measured by Census Value Added in Goods Producing Industries.

Source: Statistics Canada, Survey of Production.

As indicated in Figure 2, the mineral sector is second only to agriculture in terms of its contribution to net value of production in Saskatchewan. Spinoffs from resource development have accelerated growth in other sectors of the province's economy. Resource development projects have increased construction activity, and provided markets for Saskatchewan manufactured products and services.

As a consequence of the Saskatchewan government's resource policies, the natural resource sector accounts for an increasing portion of provincial revenues. Since 1970-71, resource revenues have risen nearly twenty-fold in dollar terms, and from 8.1 percent of total revenues to 28 percent of total estimated revenues for 1980-81 (Table 2).

Table 2: Saskatchewan Government Revenues for the Fiscal Year Ended March 31

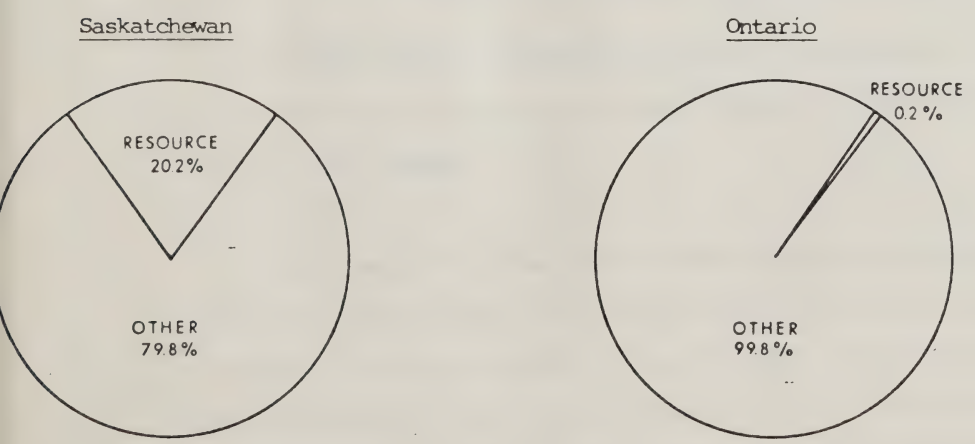
	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981
	(Millions of Dollars)										
Non-Renewable Resources	33 (8.1)	33 (7.0)	37 (6.8)	59 (7.2)	282 (24.1)	306 (23.4)	289 (20.2)	366 (23.3)	499 (27.6)	579 (28.5)	638 (28.0)
Other	373 (91.9)	438 (93.0)	506 (93.2)	763 (92.8)	886 (75.9)	1,002 (76.6)	1,145 (79.8)	1,205 (76.7)	1,309 (72.4)	1,452 (71.5)	1,639 (72.0)
Total	406	471	543	822	1,168	1,308	1,434	1,571	1,808	2,031	2,277

Note: Bracketed numbers indicate percentage of total. 1971 through 1973 are on a "net budgeting basis" while all other years are on a "gross budgeting basis".

Source: Saskatchewan Finance.

Figure 3 illustrates the importance of non-renewable resource revenues to Saskatchewan relative to Ontario.

Figure 3: Non-Renewable Resource Revenue, Saskatchewan and Ontario Governments, 1977-78



Note: The data have been prepared using a common accounting system and, therefore, may differ from that reported in Table 2.

Source: Statistics Canada, Provincial Government Finance - Revenue and Expenditure, 1977.

In Saskatchewan, all non-renewable resource revenues are channelled into the Saskatchewan Heritage Fund. About 60 percent of these revenues is subsequently paid as a dividend to the Consolidated Fund to help finance the government's ongoing programs and services to the public. The balance of the revenues in the Heritage Fund is used for further development of Saskatchewan and to ensure that a share of the benefits of current resource development is passed on to future generations.

By the end of 1980-81, the total assets of the Heritage Fund are estimated to be $915 million - not an insignificant sum, but less than one half of the province's annual budgetary expenditures. While contributing to Saskatchewan's economic development, the revenues from resource development in Saskatchewan have not resulted in the accummulation of a vast, unused pool of wealth.

The development of Saskatchewan's mineral resources has helped strengthen Canada's balance of payments through the export of potash, heavy oil and uranium.

Dollar benefits to the rest of Canada have also been substantial. Since 1974, Saskatchewan has forgone revenues in excess of $3.2 billion by the sale of its oil at less than the prevailing price in the international market. Of this amount, $1.9 billion was a benefit to the citizens of eastern Canada who were buyers of Saskatchewan's crude and, $1.3 billion was collected by the federal government by

its oil export tax. In addition, the federal government collected about $400 million in corporate income taxes from Saskatchewan's production, and about $130 million from the special excise tax introduced in 1975. By comparison, since 1974, the government of Saskatchewan has collected $1.8 billion in royalties and income taxes from the oil industry.

It is obvious that the control of natural resource development is extremely important to Saskatchewan for a number of reasons:

- resource development provides the basis for the continued stabilization, diversification and stimulation of the provincial economy;
- resource development provides an important proportion of total provincial revenues;
- resource development contributes to the achievement of various social and environmental objectives.

The Saskatchewan government has taken real advantage of the mineral resources of the province, both through revenue arrangements and careful development. This has served to deepen and stabilize the overall economic strength of the province. But, even with this new impetus, Saskatchewan continues to receive some equalization payments and provincial personal income per capita remains well below that of the richer provinces.

In the future, resource development projects in potash, uranium and heavy oil will continue to make major contributions to Saskatchewan's economic growth. This will complement the agricultural strength of the province but it also serves to stabilize the economy and counterbalance the swings in agriculture. This is critical to the management of the Saskatchewan economy.

The Government of Saskatchewan intends to continue its policy of managing resource development to maximize the social and economic benefits obtained by the province.

The constitution must therefore ensure that the province has control of mineral resource development and taxation.

II. HISTORY

In 1905, when Saskatchewan and Alberta were made provinces, the federal government withheld from them ownership of Crown lands and resources. The original provinces had kept their lands and resources under section 109 of The British North America Act of 1867 (BNA Act). This disparity raised strong resentment. Finally, in 1930, the federal government agreed to transfer Crown lands and resources to the prairie provinces, or to be more precise, those lands and resources that the federal government had not already sold off.

The transfer was made by the Natural Resources Transfer Agreements of 1930, which were confirmed by federal and provincial statutes and by the United Kingdom Parliament in the BNA Act of 1930.

It is often said that provinces own all the natural resources. This is misleading. The fact is that there are many private (freehold) owners of natural resources, i.e. the private owners of "mines and minerals". Those interests for the most part were granted by the federal government when it disposed of its land to the C.P.R. and to homesteaders. In the late 1880's the federal government began to "reserve" the mineral title when disposing of land; that is, it sold or granted the land without the minerals, which it then continued to own.

Because of the progression of settlement of the prairies from East to West, therefore, the ratio of Crown-owned minerals to freehold minerals increases from Manitoba to Saskatchewan to Alberta (about 75% freehold in Manitoba; 40% in Saskatchewan and 15% in Alberta). Northern regions are exceptional, because of the settlement patterns, and are generally Crown mineral areas.

As will be explained below, provincial ownership, or lack of ownership, is, under the current constitution, important for the purposes of the rights of provinces with respect to natural resources.

III. THE BNA ACT

A. Powers Respecting Resources Generally

The BNA Act does not treat "resources" in any specific way. The various aspects of the control, regulation and taxation of natural resources fall to be determined, in general, under the various federal and provincial law-making powers. Under section 92, for example, provinces have the power, amongst others, to make laws in relation to direct taxation in the province, property and civil rights in the province, local matters and local works and undertakings. There is also section 92(5) relating to management and sale of Crown lands.

Federal powers that can apply to resources include the plenary taxing power, interprovincial and international trade and commerce powers, the emergency powers under the "Peace, Order and Good Government" (POGG) clause of section 91 and the power to declare unilaterally that any work is for the general advantage of Canada, which, when used, has the effect of bringing the declared work, and any undertaking associated with it, under federal jurisdiction in all important aspects of its operation.

Ownership by a province becomes important, then, because it allows a province to do all those things that any owner can do, and brings into play the specific power over the management and sale of public lands. The rights of a province as owner of a resource, usually referred to as proprietary rights, likely afford to the province a somewhat greater latitude in the sorts of things it may do with them than is the case where it is not the owner. For example, it may lease a mineral right and, in the lease, provide for a royalty, a share of production. The lessee has agreed to pay the royalty; it is not a tax because of the voluntary agreement to pay. Because it is not a tax, the important distinction between direct taxes (which a province can impose under the constitution) and indirect taxes (which it cannot) becomes irrelevant. In fact, virtually all royalties, if they were taxes, would be held to be indirect and beyond provincial powers.

Further, provincial proprietary rights allow the imposition of other terms and conditions that would be invalid under the constitution if they were imposed by a province for resources it does not own. Of course, actions taken by a province as owner are subject to being overridden by federal laws if they conflict with those laws. The

courts have not in recent times examined this area of proprietary rights. What is said above, therefore, is not certain. And, as mentioned earlier, for many provinces the rights of ownership are not particularly useful because they are not, in varying degrees, owners of the resources.

Saskatchewan and other provinces have submitted that the Constitution should contain an express declaration of provincial powers to manage and tax resources in order to clarify all of the above matters.

B. Taxing Powers

As mentioned above, the BNA Act allows the Parliament of Canada to raise money by "any mode or system of taxation". The provincial legislatures have a limited taxing power: "direct taxation within the province in order to the raising of a revenue for provincial purposes". The courts have developed, and continue to develop, an elaborate body of law on the distinction between direct taxes, which a province can impose, and, indirect taxes, which it cannot. The distinction is based on 19th century economic theory and on definitions that some argue are now hopelessly outmoded. But they continue to be applied by the courts. The

"directness" and the validity of novel forms of provincial tax are difficult to predict with certainty.

With respect to resource taxation, these problems are particularly acute and are highlighted by the decision of the Supreme Court of Canada in late 1977 in the case of Canadian Industrial Gas and Oil Ltd. (CIGOL) vs. The Government of Saskatchewan.

The part of that judgement concerning taxation powers struck down taxes imposed by the Saskatchewan Legislature as a result of the energy crisis of 1973, which saw the world price of oil rise dramatically. Saskatchewan had moved to ensure that the benefits of the price increases and windfall profits accrued to the province. The Supreme Court of Canada overturned the decision of the Saskatchewan Court of Appeal (and also the trial judge) and held, by a majority, that the tax was indirect and invalid.

In the area of resource taxation, more than in any other area of taxation, special problems have arisen as a result of the CIGOL case.

For example, in that case the judgment of the Supreme Court of Canada placed emphasis on the fact that nearly all of the oil was exported from the province. This holds true for nearly all Saskatchewan non-renewable resource production. The majority considered the tax to be an export tax and therefore beyond the province's powers, apparently merely because the oil went out of the province. This position was taken even though there was no difference between the tax charged for oil staying in the province and oil moving outside the province.

The result of the case put into doubt hundreds of millions of dollars of provincial revenue for Saskatchewan alone. Corrective measures were enacted by the Saskatchewan Legislature shortly after the decision, but the fact remains that this area of our constitution is in need of change to abolish, for resources, the outmoded distinction between direct and indirect taxes. (See the Appendix to this paper for the text of a telex sent by Premier Blakeney to Prime Minister Trudeau after the CIGOL decision was handed down by the Supreme Court of Canada.)

C. Trade and Commerce

Under the present Constitution, Parliament has exclusive legislative power over the regulation of trade and commerce. Because the power is an exclusive one, it not only means Parliament may legislate in relation to trade and commerce, but it also means any provincial law deemed by the courts to transgress on Parliament's jurisdiction may be struck down. In the CIGOL case, the Supreme Court of Canada majority held that the provincial law had the effect of fixing prices in the interprovincial market. This was held to encroach on the exclusive federal power and to be invalid.

Similarly, in the case of Central Canada Potash Co. Limited and the Attorney General of Canada vs. the Government of Saskatchewan, decided by the Supreme Court of Canada in October 1978, the Court held Saskatchewan's potash prorationing program invalid as encroaching on the federal trade and commerce power. The program was designed to rescue the provincial potash industry in the late 1960's and early 1970's from financial disaster. There was a glut of potash on world markets and prices were at times lower than the cost of production. The government of the day moved to restrict production, to set a minimum selling price

and to allocate markets. The Court, again reversing a unanimous Saskatchewan Court of Appeal decision, struck down the program because it was thought to regulate interprovincial and international trade, an exclusive federal power.

Saskatchewan has argued, and continues to argue, that provincial laws of this kind should not be invalid merely because they are thought to offend against an unexercised federal power. Consequently, Saskatchewan has urged that provinces be given access to a sharing of this power for purposes of export of resources from the province. Once powers are concurrent in this way, it is then necessary to provide rules (known as paramountcy rules) to determine which law, federal or provincial, prevails in the case where both have legislated and the laws conflict. Several options for this are available, and one of them is reflected in the "Best Effort" draft on resources discussed by First Ministers in February, 1979. This draft is included in the Appendix to this paper, as is Premier Blakeney's letter to Prime Minister Trudeau, sent after the Central Canada Potash case was decided.

Saskatchewan, at the same time as it urges concurrent powers in this area, recognizes that there can be instances when federal laws must prevail for the good of Canada as a whole.

D. Summary of Need for Change

The need for constitutional change respecting resources has been highlighted by successful legal challenges of provincial resource taxation and regulation measures (CIGOL and Central Canada Potash cases). These challenges have been based on the concept that provincial laws may be unconstitutional because they encroach on the exclusive federal power over interprovincial and international trade and commerce or because provincial taxes are thought to be indirect taxes.

With respect to the federal trade and commerce power, it is currently not now necessary for there to be a conflicting federal law in place for a provincial law to be held invalid. In addition, the courts have expanded, and continue to expand, the scope of this federal power, thereby increasing the danger to provincial jurisdiction.

With respect to taxation, the law on the distinction between direct taxes, which a province can impose, and indirect taxes, which it cannot, is based on 19th century economic theory and has become more and more complex through court decisions. As a result, it is difficult to predict the fate of any new form of provincial tax that is not virtually identical to one that has been tested in the courts.

These trade and commerce and taxation problems impose substantial restrictions on the ability of the provinces to manage and tax resources.

Further, it is time for our Constitution to deal specifically with provincial powers over resource management.

IV. THE CONSTITUTIONAL DISCUSSIONS

The October 1978 First Ministers' Conference on the Constitution established the Continuing Committee of Ministers on the Constitution (CCMC) to seek agreement currently on a number of constitutional issues. A report and draft proposal on "Resource Ownership and Interprovincial Trade" was one of those submitted to First Ministes in February, 1979. The draft, which has become known as the "Best Effort" draft, would:

- make an express and exclusive grant to provinces of legislative jurisdiction over exploration, development, exploitation, conservation, extraction and management of non-renewable natural resources, forestry resources, and electrical energy generation in the provinces.

- permit provinces to legislate with respect to the export of resource production, as long as the laws do not set up price discrimination against other parts of Canada; provincial export laws would prevail over federal trade and commerce laws in cases of conflict, except where the federal laws are in relation to Canadian trade and commerce and necessary to serve a compelling national interest, or are in relation to international trade and commerce, in which case the federal laws would be paramount.

- allow provinces to impose any kind of taxes, including indirect taxes, on resource production, whether it is exported or not, as long as the tax does not differentiate between production kept in the province and that exported to other parts of Canada.

(The draft is reproduced in the Appendix to this paper.)

The "Best Effort" draft on resources was the product of much bargaining and hard work and received general acceptance from most governments.

When the latest round of constitutional discussions commenced this summer, the federal government stated that it no longer supported key elements of the draft that would permit provinces to pass laws for export of resource production from the province. As a result the conflict ("paramountcy") rules were no longer even an issue. Then, later in the discussions (at the end of August), the federal government advised that for export from the province for the Canadian market, provinces would be allowed to legislate, subject to conflicting federal laws in every case. Export laws for the international side would remain exclusively federal.

This is where matters stand at the beginning of the present First Ministers' Conference.

Saskatchewan, for the reasons outlined above, continues generally to support the "Best Effort" draft, though would like to see it improved in some respects.

Saskatchewan is not prepared to surrender on the issue of resources. Resources are too crucial to the future of our province.

Saskatchewan is prepared to discuss the question of promoting greater equity in sharing the wealth - from resources and other industries - across Canada. Sharing is something Saskatchewan believes in, so long as it applies to all revenues and not just resource revenues.

APPENDIX

Draft Proposal Discussed by First Ministers

RESOURCE OWNERSHIP AND INTERPROVINCIAL TRADE

(1) (present Section 92)

(1) Carries forward existing Section 92

Resources

(2) In each province, the legislature may exclusively make laws in relation to

a) exploration for non-renewable natural resources in the province;

b) development, exploitation, extraction, conservation and management of non-renewable natural resources in the province, including laws in relation to the rate of primary production therefrom; and

c) development, exploitation, conservation and management of forestry resources in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.

(2) The draft outlines exclusive provincial legislative jurisdiction over certain natural resources and electric energy within the province. These resources have been defined as non-renewable (e.g. crude oil, copper, iron and nickel), forests and electric energy. This section pertains to legislative jurisdiction and in no way impairs established proprietary rights of provinc over resources whether these resources are renewable or non-renewable.

Export from the province of resource

(3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for prices for production sold for export to another part of Canada that are different from prices authorized or provided for production not sold for export from the province.

(3) Provincial governments are given concurrent legislative authority to pass laws governing the export of the resources referred to above from the province. This legislative capacity is in the sphere of both inter-provincial and international trade and commerce. Provincial governments are prohibited from price discrimination between resources consumed in the province and those destined for consumption in other provinces. This new provincial legislative capacity applies to these resources in their raw state and to them in their processed state but does not apply to materials manufactured from them.

Relationship to certain laws of Parliament

(4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,

a) in the case of a law in relation to the regulation of trade and commerce within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or

b) is a law in relation to the regulation of international trade and commerce.

(4) The effect of this new provincial legislative responsibility over trade and commerce diminishes the scope but does not eliminate the federal government's exclusive authority over trade and commerce. The exercise of the provincial power is subject to two limitations. First, the federal government may legislate for interprovincial trade if there is "compelling national interest". This trigger mechanism may apply to circumstances other than an emergency as established under the peace, order and good government power. Second, federal laws governing international trade prevail over provincial laws in international trade, in effect establishing a concurrent power similar to that for agriculture.

Taxation of resources

(5) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

a) non-renewable natural resources and forestry resources in the province and the primary production therefrom; and

b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom,

whether or not such production is exported in whole or in part from the province but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) Provincial powers of taxation are increased to include indirect taxes over the resources outlined in this section - whether these resources are destined in part for export outside the province. These taxes are to apply with equal force both in the province and across the rest of the country.

Production from resources

(6) For purposes of this section,

a) production from a non-renewable resource is primary production therefrom if

i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(6) In determining the scope of provincial legislative powers over resources exported from the province, it became necessary to define the degree to which the resource was processed. It is not intended to extend provincial authority to manufacturing but it is intended to extend it to something beyond its extraction from its natural state.

ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil or refining a synthetic equivalent of crude oil; and

Given the varying resources covered by this section, the wording of this subsection is thought to place the appropriate limitations on provincial powers.

b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

Existing Powers

(7) Nothing in subsections (2) to (6) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of those subsections.

(7) This clause ensures that any existing provincial legislative powers found in s.92 are not impaired by the new section.

Ottawa
February 5-6, 1979

Premier
of Saskatchewan

Legislative Building
Regina, Canada
S4S 0B3

October 10, 1978.

The Right Honourable Pierre Elliott
Trudeau, P.C., Q.C., M.P.,
Prime Minister of Canada,
House of Commons,
Ottawa, Ontario.
K1A 0A6

Dear Prime Minister:

This letter is prompted by the decision of the Supreme Court of Canada, handed down on October 3rd, in the case of Central Canada Potash Co. Limited and the Attorney General of Canada v. the Government of Saskatchewan et al. That judgment raises grave concerns with regard to provincial powers over natural resources, and will significantly influence the present discussions on constitutional reform.

First, I want to outline briefly the background and issues in the Central Canada case, although I do not intend to go into the facts and legal arguments in any great detail.

In the late 1960's and early 1970's, because of world market conditions and other factors, potash produced in Saskatchewan was being sold at very low prices -- in some instances below the cost of production -- and the potash industry in Saskatchewan was in a precarious financial position. The government of the day, under the late Premier Ross Thatcher, took steps to allocate production of potash according to the available market, and to establish a minimum floor price. Although the measures taken had very little impact upon the provincial government's revenues, they were crucial for the economy of the province and the continued viability of the potash industry. The present government inherited the prorationing scheme and continued the program, with production controls being effective until 1973.

All but one of the potash companies supported prorationing, the exception being Central Canada Potash,

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which, because of its unique captive market in the United States, was in a position different from the rest of the industry. In 1972 that company attempted unsuccessfully to force the Minister of Mineral Resources, through court action, to grant it additional production licences; when that action failed, it commenced another action, claiming that the prorationing measures infringed the federal trade and commerce power. The latter action was commenced in December 1972. The Attorney General of Canada applied to be joined as a plaintiff in the action, and obtained an order of the Court of Queen's Bench in November 1973 allowing the Canadian government to be a plaintiff along with Central Canada. The action was tried in 1974 and judgment given for the plaintiffs in May 1975. The province appealed, and the Court of Appeal for Saskatchewan, in a unanimous judgment, allowed the appeal in January 1977. Leave to appeal to the Supreme Court of Canada was granted, and the case was heard last December. In its judgment last week, the Supreme Court found the prorationing scheme to be beyond provincial powers.

The Central Canada Potash decision is only the latest in a series of unsettling judgments concerning resource jurisdiction. You will recall, in particular, the decision of the Supreme Court of Canada in the case of Canadian Industrial Gas and Oil Ltd. v. the Government of Saskatchewan in November 1977, which found Saskatchewan's oil income tax and royalty surcharge invalid and ordered repayment thereof.

Two points are worthy of special note.

The Supreme Court of Canada, in both the Central Canada and the CIGOL judgments, overturned the unanimous decision of the Saskatchewan Court of Appeal (and, in the latter case, the verdict of the original trial judge as well).

It is noteworthy, too, that the Attorney General of Canada was a co-plaintiff in the Central Canada case. This I found particularly disturbing. It will be recalled that there were extensive discussions during the genesis of prorationing, in late 1969 and early 1970, involving senior legal officials of our two governments, involving indeed the then federal Minister of Justice, John Turner. Those discussions related to the constitutional validity of the prorationing scheme and resulted in certain amendments to the regulations to satisfy federal concerns. The government of the day of this province co-operated fully with the federal

authorities to attempt to avoid or resolve potential constitutional difficulties. The record clearly shows that the governments of both Saskatchewan and Canada believed the prorationing scheme to be constitutionally valid. The only change in the prorationing regulations made by our government since 1971 was one which could only serve to strengthen their constitutional validity. You will understand, therefore, why many, including myself, perceived the subsequent action of the Attorney General of Canada in joining the action as a plaintiff against the province as a complete about-face and betrayal on the part of the federal government.

In addition to its interventions in court cases, the federal government has taken other steps to lessen provincial powers to manage and tax resources. These affect all the Western provinces. Examples that come readily to mind include the unilateral changes to the Income Tax Act that disallowed the deduction from corporate income of provincial taxes and royalties for federal tax purposes; the Petroleum Administration Act, under which the federal government assumed the power to set oil prices; the export tax on oil; certain provisions of the proposed Nuclear Control and Administration Act (Bill C-14); and, most recently, the declared intention of the federal government to abrogate the oil pricing agreement with the producing provinces.

Taken together, these actions seem to indicate a deliberate strategy to expand federal jurisdiction at the expense of provincial powers to manage and tax natural resources. In my view, the federal determination to further centralize power at the expense of the provinces is imposing very serious strains on our federal system.

I have made these same arguments over and over again. You will perhaps recall my statement at the First Ministers' Conference in December 1976, when I urged the federal government "to drop its aggressive anti-provincial stance in the taxation and control of natural resources". And you may remember my letter to you of November 29, 1977, in which I referred to "a grave risk to our federal system itself". I could cite example after example.

In the two reports of the Western Premiers' Task Force on Constitutional Trends, the four western Premiers have identified a number of federal intrusions into provincial jurisdiction over resources.

The ten provincial Premiers, in 1976 and again in Regina in August of this year, reached agreement on the

need to strengthen provincial powers over resources. Premier Lougheed's letter to you of October 14, 1976, reported our unanimous agreement on a specific text dealing with "a strengthening of jurisdiction of provincial governments" in the field of resource taxation. In Regina last August, the Premiers "agreed to advance, again, the 1976 consensus, which has not received an adequate response from the federal government".

My views on national unity are well known by now. I am sympathetic to the special problems of the province of Quebec. But I must tell you frankly that the time has come for you and your government to begin to respond to the legitimate demands of the Western provinces. If you continue to ignore the West, you will imperil the very fabric of our nation.

In terms of the constitutional changes that are required with respect to provincial jurisdiction over resources, it is perhaps not appropriate in this letter to consider specific wording. Generally, though, Saskatchewan will propose:

1. that provinces be allowed to levy indirect, as well as direct, taxes on resource production, notwithstanding the fact that the production is exported or that the incidence of the tax may be thought to fall outside the province. In particular, we will propose that each province be authorized to make laws to raise money by any system of taxation in respect of forests, mines and minerals, or the production therefrom in the province. This is along the lines of the agreement reached by the ten Premiers in 1976.

2. that the federal trade and commerce power be clarified so that it can no longer be used to frustrate a province's legitimate efforts to influence the production and marketing of its natural resources. In particular, we will propose a provision along the lines of that proposed by the Canadian Bar Association's Committee on the Constitution.

3. that changes be made to the Supreme Court of Canada, so that it will not only be, but be seen to be, an impartial arbiter of federal-provincial disputes.

. . . /5

In respect of the first of these proposals, you will know that provincial power of taxation flows from section 92(2) of The British North America Act which states:

> "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, --
>
> 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."

The courts have developed a complicated jurisprudence based on distinctions between indirect and direct taxation. The tests developed for "directness" of a tax are based on outmoded economic theories and bear little relevance to modern conditions. The courts, however, have continued to use these tests, and to expand on them to the point where it is now very difficult to predict the outcome of any case involving a novel form of taxation. It is my strongly held view that the time has come to abandon this outmoded distinction between direct and indirect taxation. With respect to its own resources, a province must not be arbitrarily excluded from any appropriate system of taxation.

On the second point above, namely the need to clarify the federal trade and commerce power, it is clear to me that the courts have in recent years greatly expanded this power as a means of restricting a province's control over the production, marketing and pricing of its resources. The Central Canada Potash case is the most recent manifestation of that expansion. The implications for proper management and regulation of provincial resources are grave and are incompatible with the effective control of resource development. It is time for action to limit the meaning of this power, substantially to the meaning given it by the courts during most of Canada's history. I shall be pressing for changes to achieve this result.

Regarding the third proposal, the time has come to make such changes as are necessary to ensure that the Supreme Court of Canada is seen to be independent and not unduly reflective of federal views in constitutional disputes. I am not questioning the integrity of those who serve on the present Court, nor am I questioning their ability. But I do question the wisdom of having the members of our Supreme Court, the final arbiter of constitutional disputes, appointed by the executive branch of one level of

government, and largely representative of one or two regions of the country -- without intervention or voice by the executive branch of provincial governments, by provincial legislatures, or by Parliament. It is clear that a provincial role in the appointment process would be desirable. Consideration might also be given to formal regional representation on the Court.

I will be raising these concerns at the First Ministers' Conference on the Constitution at the end of this month.

Let me emphasize once again our serious concern that the constitutional rights of provinces to manage their resources are being systematically eroded by a succession of federal actions and judicial rulings. That is a situation which I believe will not long be tolerated by the people of Saskatchewan and Western Canada.

I trust we can make early progress toward securing the necessary constitutional changes.

Yours truly,

Allan Blakeney,
Premier

The Right Honourable Pierre Elliot Trudeau, November, 1977
P.C., Q.C., M.P.,
Prime Minister of Canada,
House of Commons,
Ottawa, Ontario.
K1A 0A2

My dear Prime Minister:

I am writing to discuss certain issues raised by the November 23rd judgement by the Supreme Court of Canada in the CIGOL case. As you know, that decision overturned the unanimous ruling of the Saskatchewan Court of Appeal in finding ultra vires Saskatchewan legislation and regulations respecting oil royalties and taxes.

The Supreme Court's decision poses a serious problem for the Government of Saskatchewan. The precedent established places at risk some $500 million which has been collected since 1974 under the legislation. I want to assure you that this government intends to take whatever action may be necessary, and that is within our jurisdiction, to ensure that the major share of windfall profits from oil price increases are retained by the Saskatchewan people, and do not revert to the oil companies.

My concern, however, extends beyond the immediate practical difficulties faced by Saskatchewan.

It seems clear that the implications of the Court's decision for our federal system are profound. The grounds for the majority decision -- the manner in which the "direct taxation" test was applied, and the interpretation given to the federal trade and commerce power -- seem to put in serious jeopardy the capacity of all provinces to raise revenues from resources. Such a result would mark a fundamental change in Canadian jurisprudence, would affect the fiscal capacity of a number of provinces, and would constitute a grave risk to our federal system itself.

I am one who firmly believes that laws are best made, and changed, by elected legislatures. And I would view with concern any tendency on the part of Canadian governments to leave fundamental questions of policy to judicial determination.

My government has always acted, in good faith, on the assumption that the provinces have the power to control, and derive benefit from, the resources within their boundaries. That is our understanding of the letter and the spirit of the B.N.A. Act. In our view, it constitutes one of the basic underpinnings of our federal system.

That basic assumption, that fundamental premise of Confederation, has now been challenged. And I believe we must move quickly to restore a sense of confidence and certainty.

I believe that we must now face squarely the difficulties which the provinces have encountered in the area of resource taxation. I believe we must, without delay, take constitutional action that will confirm the powers of the provinces to control and tax resources.

As you know, the subject of resource taxation figured prominently in the constitutional discussions held last year by Canada's ten provincial Premiers. Unanimous agreement was reached on the need to clarify and strengthen provincial jurisdiction in this area. Indeed, the Premiers were unanimous on the specific wording of a constitutional amendment that would give provinces the right to levy indirect, as well as direct, taxation on resource production. Such a provision would go far to remove one perennial source of uncertainty and ground for litigation. And such a provision would be compatible, I believe, with positions adopted by the federal government in constitutional discussions prior to the Victoria Conference of 1971.

In view of the Court's reasoning in the CIGOL case, it may be necessary to consider, also, ways in which we could clearly delineate the boundary between the provinces' rights to tax resources and the federal government's jurisdiction over interprovincial and international trade and commerce.

I cannot believe that, at this time in Canada's history, you would welcome a decision by the Supreme Court that could have the effect of substantially enlarging federal jurisdiction at the expense of the provinces. I am confident, therefore, that you share my concern, and see some advantage in moving quickly and decisively to protect provincial authority.

I look forward to discussing these matters with you when we meet, December 7th, in Regina.

It is my intention to make the contents of this telex public on the morning of Wednesday, November 30th.

Yours sincerely,

Allan Blakeney,
Premier.